Bunting Bearings Corp. *and* Paper, Allied Industrial, Chemical and Energy Workers, International Union, AFL–CIO, CLC and its local 6-0293 and Dana Kane. Cases 7–CA–43996, 7–CA–44208-1, 7–CA–44266-1, 7–CA-44266–2, 7–CA–44614, 7–CB–12863, and 7–CA–44794

October 29, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On July 5, 2002, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified below.

[1] Respondent Bunting did not except to the judge's findings that it violated: Sec. 8(a)(1) by videotaping employees on the picket line established by the Union; Sec. 8(a)(3) by discharging Todd McNett for refusing to cross the picket line; and Sec. 8(a)(5) by implementing a partial lockout of its nonprobationary bargaining unit employees several hours prior to the expiration of the parties' collective-bargaining contract.

Respondent Union did not except to the judge's finding that it violated Sec. 8(b)(1)(A) by steward Lee Asakevitch's statement to employees-union members that they could lose their jobs and be blackballed from further employment with a union employer if they crossed the picket line.

The General Counsel did not except to the judge's dismissal of complaint allegations that: Respondent Bunting violated Sec. 8(a)(1) by soliciting employees to provide incorrect information to the Board, and 8(a)(3) and (4) by contesting the unemployment insurance benefits claim filed by office clerical employee Dana Kane; and that Respondent Union violated Sec. 8(b)(1)(A) by threatening employees with physical violence if they crossed the picket line, and by Union president Witt and Union agent Ferson threatening employee-union members that if they crossed the picket line they would lose their jobs, be blackballed, and assessed fines in excess of that allowed under the union constitution.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

1. The principal issue in this case is whether the Respondent violated Section 8(a)(3) and (1) of the Act by implementing a partial lockout of the bargaining unit following an impasse in negotiations for a successor collective-bargaining contract. In agreement with the judge, and contrary to our dissenting colleague, we find that the lockout was lawful. Consequently, we further agree with the judge that because the lockout was lawful, it did not taint a decertification petition subsequently circulated by a majority of unit employees, and the Respondent did not violate Section 8(a)(5) by relying on that petition to withdraw recognition from, and to refuse to bargain with, the Union.

Facts

Summarizing the relevant facts, the Respondent and Union were parties to a collective-bargaining contract that was set to expire on April 26, 2001.[3] The contract covered a bargaining unit of production and maintenance employees that included both probationary and nonprobationary employees.

The contract contained a provision specifying a probationary period of 90 working days. This provision was referenced in the Union Shop clause of the contract which required all unit employees to become union members at the completion of their 90-day probationary period. The parties stipulated at the hearing that all of the nonprobationary employees were members of the Union.

During the 90-day probationary period, the contract specified that probationary employees were "without seniority," which significantly limited their contractual rights during that period. For example, the contractual provisions pertaining to the Respondent's selection of employees for layoff, recall, filling of vacancies and shift preference did not apply to probationary employees, nor were they covered by the contractual progressive disciplinary policy. Further, unlike nonprobationary employees in the unit, the probationary employees were not covered by life insurance and were not entitled under the contract to holiday and sick leave pay. Health Insurance coverage was not available until after 45 working days.

In March, the parties commenced negotiations for a successor contract. At the conclusion of a negotiation session held on April 19, Union negotiator Ferson informed the Respondent that the parties were at impasse and requested the Respondent to submit its best and final contract offer. Ferson also told the Respondent that a strike authorization vote would be conducted. A few days later, a strike vote was taken among the nonprobationary union members only. They unanimously author-

[3] All dates are in 2001.

ized a strike if the Respondent did not submit a satisfactory final offer by the time that the contract expired on April 26.

The Respondent presented its final contract offer to Union president John Witt on April 26. Witt convened a meeting only of nonprobationary union employees to consider the offer. They rejected it. The next day, the Respondent locked out the nonprobationary unit employees, who immediately set up a picket line outside the plant. The probationary employees were not locked out.

Throughout the lockout, the Respondent maintained its production and maintenance operations, utilizing its probationary employees, supervisors, office clericals and employees from the Respondent's other plants.

The parties continued to negotiate during the lockout until, on May 17, the Respondent invited the nonprobationary employees back to work on terms set forth in its last, best and final offer that had been presented to the Union. The Respondent stated that its offer would be implemented on May 21. The Union rejected the offer and commenced a strike on May 21.

Analysis

It has been well settled, since the Board's landmark decision in *Harter Equipment*,[4] that as a general rule an employer violates neither 8(a)(1) nor 8(a)(3) when, after a bargaining impasse has been reached, it applies economic pressure on its employees to accept its bargaining position by locking them out and continuing business operations with temporary employees. The Board based its holding in *Harter* on the Supreme Court's two lockout cases: *American Ship Building*[5] and *Brown Food Stores*[6]. Together, these cases held that employer lockouts in support of legitimate bargaining demands are not per se unlawful; rather, to be violative, the "Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus." *Brown Food*, 380 U.S. at 288.

Harmonizing these and other legal principles discussed by the Court in *American Ship* and *Brown Food*, the Board in *Harter* identified the following factors to be considered in evaluating alleged violations of Section 8(a)(1) and 8(a)(3) within the context of a lockout:[7]

(1) operating with temporary replacements while maintaining a lockout in support of a legitimate bargaining position constitutes conduct that is "prima facie lawful" because it furthers a "business purpose" the "validity" of which is "unassailable" (280 NLRB at 599–600);

(2) conducting an economically-based bargaining lockout while continuing to operate with temporary replacements has only a "comparatively slight" adverse discriminatory effect on protected employee rights, and is not "inherently destructive" of such rights (id.); but

(3) even assuming the prima facie lawfulness of a lockout in support of a legitimate bargaining position, a violation will be found if, under the standard set forth in *Great Dane Trailers*[8] for assessing "comparatively slight" conduct, the lockout was implemented with "specific proof of antiunion motivation" (id. at 597 and 600).

In our recent decision in *Midwest Generation*,[9] we considered the foregoing factors in concluding that the lockout there was lawful. We reach the same result here. Thus, in agreeing with the judge that the lockout was lawful, we find that his conclusion properly accords with the *Harter* considerations.

First, with respect to the "business purpose" requirement of the lockout, we reject the dissent's assertion that the lockout was not in support of the Respondent's bargaining position. The evidence plainly establishes that it was. As recounted above, negotiations for a successor contract had reached impasse at the conclusion of the April 19 bargaining session. No party disputes this. Further, the Union advised the Respondent after the April 19 bargaining session that a vote would be conducted within days to consider whether to strike if the Respondent did not submit a satisfactory contract offer by the April 26 contract expiration date. Thus, as of that point, the Union had set the stage for economic warfare if it was dissatisfied with the Respondent's proposals for a successor contract. When the Respondent's offer was presented and rejected by the Union on April 26, the Respondent resorted to the economic weapon of a lockout. Under these circumstances, we find inescapable the conclusion that the purpose of the lockout was to pressure the Union to reconsider the Respondent's contract proposals. As the Board stated in *Harter*, such a purpose is not only a legitimate business objective, but its validity is "unassailable." 280 NLRB at 599.

[4] 280 NLRB 597 (1986), enf. sub. nom. *Local 825, IUOE v. NLRB*, 829 F.3d 458 (3d Cir. 1987).

[5] *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965)

[6] *NLRB v. Brown Food Stores*, 380 U.S. 278 (1965).

[7] We recognize that the primary issue in *Harter* was the use of the lockout weapon while operating with temporary replacements. The issue in the instant case is the use of the lockout weapon while operating with probationary employees. However, in both cases, the issue is the same, viz, whether the evidence establishes that the lockout was in support of a legitimate bargaining position and was not motivated by antiunion animus.

[8] *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[9] *Midwest Generation*, 343 NLRB No. 12 (2004).

Having found, therefore, that the Respondent's lockout was in furtherance of a legitimate bargaining position, we are required under *Harter* to view the lockout as having only a "comparatively slight" adverse effect on protected employee rights. As such, the lockout will not be found to violate Section 8(a)(3) and (1) "absent specific proof of antiunion motivation." *Harter*, supra at 597, 600.

The dissent argues that such proof has been established by the fact that the Respondent locked out only the nonprobationary unit employees, all of whom were union members, while not locking out the probationary unit employees, all of whom the Respondent believed were not union members. The dissent concludes that "only anti-union animus can explain why the Employer distinguished between union members and non-members" and that, by discriminatorily locking out only the nonprobationary union members the Respondent violated Section 8(a)(3).

The dissent seeks to fit this case within dicta in *American Ship*. Although the lockout in *American Ship* was found to be lawful, the Court said that "[t]here is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member . . . ." 380 U.S. at 312. Here, of course, that claim is squarely presented but, as did the judge, we reject it.

At the outset, we note that the Respondent did not draw a line between Union members and non-members. It drew a line between probationary employees and nonprobationary employees. Concededly, the former were not union members and the latter were all union members. Thus, the issue is whether the Respondent drew the line *because* of union membership or *because* of probationary status. We conclude that the General Counsel has not established the former. To the contrary, it is clear that the latter is true.

There were substantial differences between the probationary employees and the nonprobationary employees. Those differences concerned the treatment that probationary employees were accorded under the expiring contract and under the one being proposed by the Respondent as a successor contract. As described above, the probationary employees were accorded no seniority and thus enjoyed few of the contractual rights that the nonprobationary employees enjoyed. An article of the expiring contract that was to remain unchanged in proposals for a new contract specifically stated that "[d]uring an employee's [probationary] period, the Company at its option may demote, transfer, layoff or dismiss the employee. . . ." Other contractual provisions excluded the probationary employees from holiday and sick leave pay, as well as health insurance and life insurance coverage.

In light of these contractual differences between the two groups, it was reasonable for the Respondent to distinguish between them by locking out only the nonprobationary employees, since they were the ones who had a more vital interest in the proposals for a new contract. As explained in our decision in *Midwest Generation*, the law does not require that lockouts encompass the entire bargaining unit. An employer is privileged to place pressure where it will be most effective. Further, the Union itself viewed the two groups sufficiently distinct to accord them different treatment. As discussed above, the Union excluded the probationary employees from the vote on whether to accept the Respondent's contract proposals. This fact completely undercuts the dissent's assertion that "[e]mployees surely recognized that union membership determined who was lockout and who was not." Instead, the employees surely recognized that their probationary or nonprobationary status was determinative as to who was locked out.

This case differs greatly from *Schenk Packing*,[10] on which the dissent relies. In *Schenk Packing*, the respondent distributed a memorandum to employees expressly telling them that a lockout of "all Union employees" would be implemented, that "non-union employees" would be employed as replacements during the lockout, and that locked out union employees would be required to resign their union membership to be considered for employment during the lockout. The Board found that, unlike the example distinguished in dicta in *American Ship*, these facts conclusively established that the lockout was unlawful because the memorandum, coupled with the subsequent re-hiring of 10 locked out employees after they resigned their union membership, was sufficient evidence to support a finding "that discouragement of the unit employees' union membership was a fundamental objective" of the lockout. 301 NLRB at 490.

By contrast, the Respondent here did not discriminate based on union membership, much less expressly disclose an unlawful motive. Rather, the Respondent disclosed, and the facts support, a lawful motive. We find this distinction to be a material difference because, as indicated above, the instant case does not involve the kind of evidence, as in *Schenk Packing*, to establish an unlawful motive.

Nor do we agree with the dissent that our recent decision in *Allen Storage & Moving*[11] is inconsistent with the conclusion that we reach here. The Board found the

[10] *Schenk Packing Co.*, 301 NLRB 487 (1991).
[11] *Allen Storage & Moving Co.*, 342 NLRB No. 44 (2004).

lockouts unlawful in *Allen Storage*, based on evidence that they were not in support of a legitimate bargaining position but, rather, were in support of a bargaining position that violated Section 8(a)(5). By contrast, the Respondent's bargaining position here was lawful. Further, there was abundant evidence in *Allen Storage*, independent of the lockouts themselves, that the lockouts were implemented with the unlawful retaliatory purpose of punishing employees for engaging in protected strike activity. That evidence consisted of: providing holiday pay to replacement employees while denying such pay to strikers who had just been recalled after the first lockout; refusing to pay recalled strikers 4 hours of contractually required orientation pay; inducing 2 strikers to abandon the union by conditioning their reinstatement on their becoming nonunit owner-operator drivers; and disparately treating unit employees by not locking out a nonstriker. Simply put, our decision in *Allen Storage* in no way resembles the instant case and does not support a finding that the Respondent's lockout was unlawful.

The dissent argues that our discussion of the legal justification for the lockout here was "invent[ed]" by us and was never articulated by the Respondent as part of its defense. This argument does not properly distinguish between those matters which must comprise the General Counsel's prima facie case and those matters which comprise a defense to a prima facie case. In the instant case, it was the General Counsel's burden to prove that the motive for the lockout was to discriminate against union members. In an effort to show discrimination based on membership, the General Counsel sought to show that the sole distinction between probationary employees and non-probationary employees was the union membership of the latter, and thus, he argued, the distinction between the two groups of employees constituted unlawful "union membership" discrimination. However, we have shown that the critical difference between the probationary and non-probationary employees was the difference in their economic interests. We explained this difference simply to indicate that the General Counsel did not meet his prima facie burden. Thus, it is not the case that we have "assisted" the Respondent in its defense. The Respondent needed no such assistance. The General Counsel failed to establish a prima facie case.[12]

With further respect to our conclusion that the General Counsel did not meet his burden, we note that, in his brief to the judge, the General Counsel devoted just one paragraph of argument to the proposition that the lockout was unlawful. That argument was strictly limited to a *Schenk Packing* theory of violation and the only evidence cited in support of the argument was the fact that the nonprobationary union employees were the only employees locked out.

The judge, whose conclusion we adopt, refused to find a violation on such slim evidence. He properly confined his analysis to the sole theory presented to him and rejected it for the reasons that we have discussed above. Accordingly, the General Counsel failed initially to establish that the lockout was unlawful.

The dissent, relying on *Tidewater Construction*,[13] asserts that the Respondent presented a "demonstrably false" reason for its lockout by claiming that the Respondent needed the probationary employees to "maintain[ ] operations during the lockout." According to the dissent, this could not have been the Respondent's goal, because achieving it would have counseled the selection of the nonprobationary employees who were more experienced.

The error of this argument is readily apparent. The non-probationary employees were the target of the lockout. They, not the probationary employees, were the ones who rejected the Respondent's bargaining proposals. Allowing them to work would have defeated the lockout's objective of pressuring them to accept the Respondent's bargaining proposals. The Respondent was not, as the dissent seems to suggest, looking for the most skilled individuals to maintain operations during the lockout. The most skilled were locked out because that was the Respondent's way of exerting bargaining pressure. Thus, the probationary employees were used, not because they possessed the most knowledge and best experience, but, rather, because they had *sufficient* knowledge and experience.[14]

The dissent also points to testimony by a respondent official that he thought, by operation of the Union Shop clause's 90-day grace period to join the Union, that the probationary employees were not union members. The fact that he thought this to be true does not establish that union membership considerations were the basis for the lockout. As shown above, bargaining pressure was the basis for the lockout, and that pressure was aimed at those employees whose interests were most at stake in the bargaining and who, in fact, were the only ones who

[12] Interestingly, after (inaccurately) accusing us of making an argument that the Respondent did not make, the dissent chooses to rely upon an argument that the General Counsel did not make. See fn. 9 of the dissent.

[13] *Tidewater Construction Corp.*, 341 NLRB No. 55 (2004).

[14] Accordingly, *Tidewater Construction* is not on point. That case simply involved a refusal to hire certain applicants during a lockout. In finding that the refusal to hire was motivated by the applicants' union membership, the Board relied in part on a false reason given by the respondent for the refusal to hire. By contrast, the Respondent here did not assert any false reasons for its lockout or for who it locked out.

voted to reject the Respondent's proposals for a new contract.

In *Central Illinois Public Service*,[15] a case which also involved an allegedly unlawful lockout, the Board cautioned that "[w]hen determining the motivating factor, 'an unlawful purpose [will not be] lightly inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one.'" 326 NLRB at 934, fn. 21 quoting *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956). Stated otherwise, as in *Brown Food*, we must find that the Respondent was "*primarily* motivated by an antiunion animus." 380 U.S. at 288. (emphasis added). That is not shown here.

In our *Midwest Generation* decision, we noted that the Board has sanctioned an employer's decision to lock out some unit employees, but not others, if there is a valid business justification for doing so. The employees in that case struck in support of their bargaining demands but eventually terminated the strike and offered unconditionally to return to work. They were refused reinstatement and were locked out until they agreed to accept the Respondent's bargaining demands. The respondent, however, did not lock out "crossover" employees who had abandoned the strike while it was in progress and returned to work. The Board found that distinguishing between the two groups was lawful because there was no reason for the respondent to pressure the crossovers to accept its bargaining demands by locking them out, for they had already eschewed the strike weapon during the strike, i.e., they had crossed the picket line and returned to work.

Applying analogous reasoning here, we conclude that the lockout of the nonprobationary employees was legally justified. Because probationary employees had a lesser interest in the Respondent's bargaining proposals, and because they were disenfranchised from any Union vote on whether to accept its proposals, the Respondent had a lesser need to pressure them to accept the Respondent's proposals. As the group that controlled the outcome on whether to accept its bargaining proposals, we find that the Respondent's decision to target the nonprobationary employees with the lockout was motivated by legitimate business reasons rather than membership considerations.

Our colleague misinterprets our position as saying that an employer could selectively lock out those who are union members (because only they can vote on the employer's proposals) or those who are union leaders (because they are the ones with the most influence to accept/reject the employer's proposals.) We make no such argument. We confine ourselves to the facts of this case, i.e. there was a real difference in "economic interest" between the probationary and nonprobationary employees and the Respondent could lawfully base its lockout strategy on that difference. Accordingly, we find that the Respondent did not violate Section 8(a)(3) and (1).

2. The consolidated complaint also alleged that plant manager Steven Kaylor threatened employees with discharge if they refused to cross the picket line established by the Union. The judge found, based on the credited testimony of office clerical employee Dana Kane and probationary employee Todd McNett, that Kaylor told Kane and other office clerical employees that refusal to cross the picket line would be grounds for termination and that one of those clericals repeated this statement to McNett when he called to state that he would not cross the picket line. However, the judge failed to make a finding whether Kaylor's statement violated the Act as alleged.[16] The General Counsel excepts to the judge's failure to find that Kaylor's statement violates Section 8(a)(1). We find merit in this exception and conclude that Kaylor's statement constituted an unlawful threat against employees that they would be discharged if they engaged in the protected Section 7 right of refusing to cross a lawful picket line. The threat was violative of Section 8(a)(1). *Overnite Transportation Co.*, 336 NLRB 387, 388, 390–391 (2001). However, because we find that the judge implicitly discredited that aspect of Kane's testimony that Kaylor's statement was made or conveyed to probationary employees other than McNett, we reject the General Counsel's exception that these employees were similarly threatened with discharge in violation of Section 8(a)(1).[17]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bunting

[15] 326 NLRB 928 (1998), enf. sub. nom. *Local 702, IBEW, AFL-CIO v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000).

[16] Fn. 18 of the judge's decision.

[17] As stated above, the judge found, and we agree, that the Respondent lawfully withdrew recognition from the Union on May 31, 2001, based on a petition signed by a majority of unit employees on May 29, and that the unfair labor practices found herein did not taint the employee petition. Although we have found that the Respondent committed an additional violation of Sec. 8(a)(1), by threatening to terminate office clerical employees who refused to cross the Union's picket line, that violation did not taint the petition. Thus, the office clerical employees at whom the threat was directed were not part of the bargaining unit and there is no evidence that any unit employee was aware of this threat at any time material to this proceeding. Accordingly, there was no causal relationship between this unfair labor practice and the Union's loss of majority support.

Bearings Corporation, Kalamazoo, Michigan, its officers, agents, successors and assigns and Respondent, Local 6-0293, Paper Allied, Industrial, Chemical and Energy Workers International Union, its officers, agents, and representatives shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(a) in the recommended Order pertaining to Respondent, Bunting Bearings Corporation, and reletter the current paragraphs, accordingly.

"(a) Threatening office clerical employees with discharge for refusing to cross a union picket line."

2. Substitute the attached notice to be posted by the Respondent, Bunting Bearings Corporation, for that of the administrative law judge.

Dated, Washington, D.C. October 29, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Some lockouts are lawful; others, like the one involved in this case, are not. An employer may lock out its employees, if the lockout is intended "solely as a means to bring economic pressure to bear in support of the employer's bargaining position." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 308 (1965). But a lockout intended to "discourage union membership or otherwise discriminate against union members as such," id. at 312, violates Section 8(a)(3) of the Act.

The lockout here was just such a tactic. The Employer locked out only union members. In contrast, probationary employees, who the Employer admittedly believed were *not* union members, were instructed to report to work. When the Union set up a picket line, the Employer fired the one probationary employee who refused to cross, an unfair labor practice the Employer concedes. Not surprisingly, the Union soon lost support among employees, and the Employer seized on that fact to stop bargaining and to withdraw recognition from the Union.

The majority sees no problem here. It tacitly accepts the Employer's claim that the selective lockout was legitimately motivated by the need to continue operations. In fact, that rationale does not stand up, precisely because of w*hich* employees were chosen to work: the least experienced and least knowledgeable workers in the unit. Not surprisingly, then, the majority invents its own rationale, never advanced by the Employer, to justify the selective nature of the lockout: that probationary employees had less influence over the Union's bargaining position than did nonprobationary employees. As I will explain, the majority clearly errs in failing to find that the partial lockout was unlawful and with it, the employer's refusal to bargain and withdrawal of recognition.[1]

I. FACTUAL BACKGROUND

The material facts are as follows: The respondent Employer operates a metal bearings plant in Kalamazoo, Michigan. The Union was the bargaining representative for 33 unit employees, 8 of whom were probationary on April 26, 2001, when the parties' collective-bargaining contract expired.[2] Under the terms of the contract, probationary employees were required to become members of the Union at the completion of their probationary period, which was 90 working days. On April 26, the 25 non-probationary unit employees were all union members.

On the afternoon of April 26, after the parties had failed to reach agreement on a new contract, the Employer, at the Union's request, submitted a final offer. The offer was rejected at a union meeting later that day, but the Union offered to work without a contract while continuing negotiations for the next 2 working days. The Employer declined this offer and, later in the same day, assembled all the unit employees, gave COBRA notices and paychecks to all nonprobationary employees, and told only the probationary employees to report to work the next day.

The following day, the union established a picket line outside the plant manned by nonprobationary employees. All the probationary employees except Todd McNett crossed the picket line and reported for work, as instructed by the Employer. Four nonunit clerical employees also worked in the plant that day (a Friday).[3]

Probationary employee McNett called the Employer's office early the morning of April 27, to state that he would not cross the picket line. McNett was informed by the person who answered the phone that refusal to cross

[1] In all other respects, I join the majority's decision.

[2] All dates are in 2001.

[3] Employer witnesses indicated that "several people" were transferred in from other facilities, and the Employer makes an unsupported assertion in its brief that it retained the probationers because they had "necessary knowledge and experience that could be shared with the other temporary replacements." However, the record shows that no employees were transferred in from other facilities until the following week.

the picket line would result in discharge, and he was discharged later the same day.[4]

The lockout continued from April 27 to May 21. The parties continued to negotiate during that time but failed to reach agreement. On May 17, the Employer sent a letter to all "non-probationary union employees," informing them that the Employer would implement its final contract offer on May 21, and indicating that they could return to work at that time. On May 21, the nonprobationary employees voted not to return to work, and the Union informed the Employer that a strike would begin as of that day.

From May 21 to May 29, a number of nonprobationary employees, including Sue Prince, crossed the picket line and returned to work. On May 29, Prince obtained the signatures of 19 of the approximately 35 probationary and nonprobationary employees who were then working on a petition stating that they no longer wanted to be represented by the Union. On May 31, the Employer withdrew its most recent contract offer, and on June 5 it withdrew recognition of the Union.

II. ANALYSIS

Contrary to the majority's view, the Employer's lockout of non-probationary employees, its subsequent refusal to bargain, and its withdrawal of recognition were unlawful.

A. The Lockout

As the Supreme Court's decision in *American Shipbuilding*, supra, establishes, the legality of a partial lockout turns on the employer's motive. If the employer targeted certain employees for lockout with anti-union animus—i.e., with the intent of discouraging union membership—the lockout violates Section 8(a)(3) of the Act. See, e.g., *Tidewater Construction Corp.*, 341 NLRB No. 55, slip op. at 2 (2004), on remand from 294 F.3d 186 (D.C. Cir. 2002), citing *International Paper Co. v. NLRB*, 115 F.3d 1045, 1048 (1997).[5] Thus, the Board has found lockouts unlawful where an employer refused to consider for employment union members, not in the bargaining unit, who applied for work during a lockout, see id., and where an employer expressly conditioned reinstatement of locked-out unit employees on their resignation from the union. See *Schenk Packing Co.*, 301 NLRB 487, 489–490 (1991). More recently, the Board has found unlawful a lockout in which the only employee permitted to work was one who had not participated in a prior strike. *Allen Storage & Moving Co.*, 342 NLRB No. 44, slip op. at 1 (2004) ("[D]isparate treatment of former strikers is . . . evidence of discriminatory motive. . ."). This case—where union members were locked out and nonmembers were instructed to report to work—should be no different.

The analytical framework to be applied, depending on the nature of the impact of the employer's conduct, was established in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). As the Supreme Court explained there:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.
>
> Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

388 U.S. at 34 (emphasis in original). The Board, in turn, long has held that the presence of a lawful motive, as well as an unlawful motive, does not prevent finding a lockout illegal.[6]

Here, the obvious basis for deciding which bargaining-unit employees were locked out was union-membership status. Every nonprobationary employee, and thus every union member, was locked out. Every probationary employee—none of whom was yet subject to the union-security clause and all of whom the Employer believed to be nonmembers—was instructed to report to work. Employees surely recognized that union membership determined who was locked out and who was not.[7]

On this view, it would be fair to conclude, under *Great Dane Trailers*, that the Employer's conduct was "inher-

[4] The Employer did not except to the judge's finding that McNett was discharged in violation of Sec. 8(a)(3).

[5] For this reason, the majority's repeated emphasis of the Employer's undisputed right to lock out its employees in furtherance of its bargaining position misses the point. What is at issue here is the discriminatory manner in which the Employer chose to implement the lockout. Cf. *Allen Storage & Moving Co.*, supra, 342 NLRB No. 44, slip op. at 1 (lockout in support of bargaining proposal requiring employees to accept employer's unlawful conduct is itself unlawful).

[6] See *Movers & Warehousemen's Ass'n of Washington, D.C.*, 224 NLRB 356, 366 (1976), enfd. 550 F.2d 962 (4th Cir. 1977), cert. denied 434 U.S. 826 (1977). See also *Conagra, Inc.*, 321 NLRB 944, 963 fn. 34 (1996), enf. denied on other grounds 117 F.3d 1435 (D.C. Cir. 1997).

[7] The judge mistakenly pointed to the lack of evidence that the two employees who completed their probationary period during the lockout were dissuaded from joining or supporting the union. What matters, rather, is that the tendency of the lockout to discourage union support within the entire unit is inherent in the targeting of union members.

ently destructive" of employees' statutory right to join and support the Union and, in turn, to find an unfair labor practice without proof of an anti-union motive. But a violation of Section 8(a)(3) is clear even assuming that the impact on employee rights was "comparatively slight" and the Employer's ostensible business justification must be examined.

The majority agrees with the judge, who found that the Employer "had a legitimate objective of pressuring the Union to accept its final offer by locking out the nonprobationary employees, and also had a legitimate objective in making the lockout selective so that it [could] continue operations during the lockout." In fact, the record demonstrates that only anti-union animus can explain why the Employer distinguished between union members and nonmembers.

To begin, the majority points to no evidentiary basis for finding that the Employer's sole motive in distinguishing between union members and nonmembers was to exert economic pressure.[8] Like the judge, the majority relies on a factual distinction between this case and *Schenk Packing*, supra, where the employer expressly refused to permit strikers to cross the picket line unless they resigned from the union. That the Employer here did not expressly disclose an unlawful motive to employees is immaterial. Rather, a "careful evaluation of all the surrounding circumstances must be made to determine whether there was unlawful motivation in the lockout." *Darling & Co.*, 171 NLRB 801, 802–803 (1968).

McNett's concededly unlawful discharge demonstrates the Employer's anti-union animus, as do the other violations of the Act found here: the unlawful implementation of the lockout prior to the expiration of the parties' contract, the unlawful threat that employees who failed to cross the picket line would be fired, and the unlawful videotaping of employees on the picket line.[9] As to the lockout itself, it is well established that where an employer proffers a lawful reason for an allegedly discriminatory action that is demonstrably false, an unlawful reason may be inferred. E.g., *Tidewater Construction*, supra, 341 NLRB No. 55, slip op. at 3. The Employer's own testimony shows that it viewed the distinction between probationary and non-probationary employees specifically in terms of their union status.[10] On its face, then, the selective lockout of only certain employees was discriminatory.

As explained below, the majority offers its own rationale for distinguishing between probationary and nonprobationary employees. It insists, despite every appearance, that this rationale is *not* offered to supply the Employer's defense, but "simply to indicate that the General Counsel did not meet his prima facie burden." The majority dismissively observes that the General Counsel pursued only a "*Schenk Packing* theory of violation" and relied solely on "the fact that the nonprobationary union employees were the only employees locked out."[11] But no authority holds that the General Counsel must initially do more than what he has done here: show a (perfect) correlation between union membership and which employees were locked out. The *Schenk Packing* Board itself noted the Supreme Court's distinction in *American Ship Building* between a case involving a complete lockout and a case, like this one, involving a "claim that the employer locked out only union members." 301 NLRB at 490, quoting *American Ship Building*, supra, 380 U.S. at 312. As for the majority's rationale, whether it goes to the General Counsel's initial burden or to the Employer's defense, the fact remains that the Employer has never advanced it, as my colleagues tacitly concede. In effect, the majority would require the General Counsel to anticipate and rebut every conceivable justification for facially discriminatory conduct, in order merely to carry his initial burden. That is not the law.

The only lawful reason for the discrimination proffered by the Employer—maintaining operations during the lockout—is demonstrably false. Retaining only the least experienced and least knowledgeable employees in the unit belies the Employer's asserted goal of maintaining operations with only a fraction of the in-house workforce. Achieving that goal would seem to counsel the selection of at least some experienced employees who were more skilled and could best fill the most important positions or serve in multiple positions: non-probationary employees. No Employer witness testified that the pro-

[8] Contrary to the majority's characterization of my position, I do not "assert" that the lockout "was not in support of the Respondent's bargaining position." I rather point out the obvious: that the Employer's objectives here were not limited to legitimate economic pressure, but included a demonstrated intent to discourage union membership, tainting what might otherwise have been a lawful lockout.

[9] Because the Board is adopting the judge's finding of these violations, it is irrelevant that the General Counsel did not cite them to the judge in contesting the lawfulness of the lockout. The Board may base its findings on all the facts established in the record.

[10] That probationary employees *could* have been union members—had they joined the Union before they were contractually required to do so—is immaterial. What matters, rather, is what the Employer believed about their membership status. See *International Union of Operating Engineers Local 147 v. NLRB*, supra, 294 F.3d at 190 (for the purpose of determining motive, "it is . . . irrelevant whether [some of the employees locked out] were actually members of the Union, so long as [the employer] thought they were").

[11] The majority adds that the General Counsel's argument to the judge on this point comprised only one paragraph in its brief. That is, of course, one paragraph more than was devoted *anywhere* to the majority's rationale, which did not appear at all in the Respondent's brief or in the judge's decision.

bationers were in any way superior (or even equal) to the non-probationers in skill or productivity.

The majority tacitly endorses the Employer's proffered rationale, but then proceeds to offer its own rationalization for the Employer's discrimination against union members, by pointing out that the probationers had fewer rights under the collective-bargaining agreement than did the permanent union employees.[12] According to the majority, this means that permanent union employees had a more "vital interest" in the contract—a dubious assertion.[13] And from that assertion, the majority leaps to the conclusion that the Employer had a right to target the permanent employees. My colleagues also note that the Union did not allow probationers to participate in the strike vote, and that the permanent union employees were consequently "the only ones who voted to reject" the Employer's last offer.

But, as stated**,** the Employer has not even cited these asserted distinctions to the Board and clearly did not rely on them at the time of the lockout.[14] There is no basis, then, for relying on them to find the lockout lawful. Obviously, the majority may not articulate a post hoc rationale on behalf of the Employer. And even a rationale that *was* articulated by an employer as its true motive for a lockout must be proven, not merely asserted. See, e.g., *Con-Agra, Inc.*, 321 NLRB 944, 963 (1996), enf. denied on other grounds 117 F.3d 1435 (D.C. Cir. 1997).

In any case, the rationale offered by the majority is not legitimate, because, at bottom, it focuses on employees' relationship to the union as the basis for discrimination. On the majority's logic, an employer could always lock out only union members, if they were the only employees who could vote to accept the employer's offer. Or the employer could follow a somewhat more selective strategy, locking out only those employees who were the union's leaders and strongest supporters. Either measure presumably could be defended in terms of pressuring those employees with the greatest influence over the union's bargaining strategy. But both steps plainly would be unlawful discrimination. Nor can the majority's decision be reconciled with the Board's recent holding in *Allen Storage & Moving*, supra, that in deciding which employees to lock out, an employer may not discriminate on the basis of participation in a prior strike.[15]

This case is easily distinguishable from cases in which the Board has found partial lockouts lawful because employers had a legitimate operational reason for choosing some employees and not others to lock out.[16] Here, the Employer's distinction between union members and the only employees who it thought were not members could only have had one purpose: to discriminate against the first group.[17] The partial lockout therefore violated Section 8(a)(3).

B. The Refusal to Bargain and Withdrawal of Recognition

The record here demonstrates a causal connection between the Employer's unlawful lockout and the Union's loss of employee support, as reflected in the petition submitted by crossover employee Prince. Because the petition was tainted, it could not justify the Employer's refusal to bargain with the Union and its withdrawal of recognition.

The Employer withdrew its most recent contract offer on May 31, 2 days after it received Prince's petition. On June 5, the Employer withdrew recognition of the Union as the unit employees' bargaining representative. It is settled that these actions were lawful only if the withdrawal petition was untainted by previous employer unfair labor practices. E.g., *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

In determining whether a petition is tainted, the Board considers the following factors:

> (1) the length of time between the unfair labor practices and the withdrawal of recognition;

[12] A Board majority followed a similar approach, over the dissent of Member Walsh, in *Midwest Generation*, 343 NLRB No. 12 (2004).

[13] The probationers were just a few weeks away from becoming union members with all the contract rights of permanent employees. They surely had an interest in the contract that would cover them, in whatever capacity they were employed.

[14] As explained, the Employer rather makes the nonsensical contentions that it needed to retain the probationary employees in order to continue operations by sharing their "necessary knowledge and experience" with replacement workers; and to "convince the Union to accept its changes to the health insurance program." As noted above, where an employer's rationale for a discriminatory action is pretextual, it may be inferred that the real motive was unlawful.

[15] In *Allen Storage & Moving*, employee Jennings was the sole unit employee who did not participate in a strike. He was later permitted to continue working during two successive lockouts. 342 NLRB No. 44, slip op. at 14. Contrary to the majority's explanation, the Board found the lockouts unlawful "particularly" due to the "manner in which [the employer] implemented them," i.e., by allowing Jennings to work "while it barred each former striker from work." Id. at 1. The Board "further" found that the lockout was not protected, as the employer contended, under *American Ship Building*, supra.

[16] See *Bali Blinds Midwest*, 292 NLRB 243 (1989) (partial lockout lawful where employer showed it was justifiably concerned that recurring strikes would disrupt production and locked out all but a "stable base" of employees to continue minimum production); *Laclede Gas Co.*, 187 NLRB 243 (1970)(partial lockout, based solely on employees' work assignments, was justified by need to halt some operations to minimize public hazard and potential damage to facilities).

[17] For this reason, it is not true, as the majority states, that "the issue is the same" in this case as in cases that permit an employer to hire temporary replacements during a lockout. In the latter setting, there is no discriminatory treatment of employees.

(2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees;

(3) any possible tendency to cause employee disaffection from the union; and

(4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

See, e.g., *Vincent Industrial Plastics*, 328 NLRB 300, 301–302 (1999), enf. granted in part, denied in part, 209 F.3d 727 (D.C. Cir. 2000); *Williams Enterprises*, 312 NLRB 937, 939 (1993), enfd. 50 F. 3d 1280 (4th Cir. 1995).

Applying these factors, it is clear that the employee petition here was, in fact, tainted by the unlawful lockout. The lockout ended only 8 days before the Employer received the withdrawal petition and 15 days before it withdrew recognition. The lockout inevitably tended to cause employee disaffection from the Union and related loss of employee morale, and by its very nature its effect was both detrimental and lasting. *Schenk Packing Co.*, supra, 301 NLRB at 489–490 (an unavoidable effect of an unlawful lockout is to discourage employees' membership in the union). Cf. *Vincent Industrial Plastics*, 328 NLRB 300, 301–302 (1999) (unlawful discharge and discipline taints employee petition), enfd. in relevant part 209 F.3d 727 (D.C. Cir. 2000*); Columbia Portland Cement Co.*, 303 NLRB 880, 882 (1991) (unlawful suspension of employees taints employee petition), enfd. 979 F.2d 460 (6th Cir. 1991).

The lockout therefore tainted the withdrawal petition, and the Employer's refusal to bargain and withdrawal of recognition consequently violated Section 8(a)(5).[18]

III. CONCLUSION

I do not say that when it implemented the unlawful partial lockout, the Employer knew that it would result in the elimination of the Union. But that is what happened here—and it is a result directly attributable to the Employer's unfair labor practices. My colleagues allow the Employer, whose anti-union animus is established, to escape responsibility for its misconduct. Because there is no principled basis for doing so, I dissent.

Dated, Washington, D.C. October 29, 2004

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

[18] The impact of the unlawful lockout was likely only increased, of course, by the Employer's other violations of the Act during the lockout. However, I need not determine whether the judge was correct in finding that the other violations, by themselves, had insufficient impact to taint the petition.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten office clerical employees with discharge for refusing to cross a union picket line.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 6-0293, Paper Allied-Industrial, Chemical and Energy Workers International Union or any other union, for refusing to cross a union picket line.

WE WILL NOT, without just cause, videotape or photograph any activities protected by Section 7 of the National Labor Relations Act, such as picketing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Todd McNett full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Todd McNett whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Todd McNett, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL make employees whole, with interest for their loss of earnings due to our premature lockout of employees on April 26, 2001, prior to the expiration of our collective bargaining agreement with Local 6–0293, Paper Allied-Industrial, Chemical and Energy Workers International Union.

BUNTING BEARINGS CORP.

Bradley Howell and *Jamie Vanderkolk, Esqs.*, for the General Counsel.
Scott Deller, Esq. (Shoemaker, Loop & Kendrick), of Toledo, Ohio, for the Respondent Bunting Bearings Corp.
J. Douglas Korney, Esq., of Bingham Farms, Michigan, for the Respondent Union.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Kalamazoo, Michigan, from April 16–18, 2002. The charges were filed between May 4, 2001, and January 30, 2002, and the first complaint was issued July 29, 2001. The fifth order consolidating cases and the fourth amended consolidated complaint were issued on April 2, 2002.

The General Counsel alleges that the Respondent Employer, Bunting Bearings Corporation, violated the Act by locking out its employees on April 26, 2001, threatening probationary employees with discharge if they refused to cross the Union's picket line, discharging probationary employee Todd McNett for refusing to cross the picket line and allowing or requiring probationary employees to work during the alleged lockout. The General Counsel also alleges that the Employer violated the Act by withdrawing recognition and refusing to bargain with the Union after May 31, 2001, by asking Employee Dana Kane to give false information to the NLRB, by threatening Dana Kane with reprisals for assisting in the NLRB's investigation of Todd McNett's discharge, and contesting Kane's unemployment insurance claim for retaliatory reasons.

The General Counsel alleges that the Union violated the Act in threatening employees with discharge from the Union, loss of employment, and blackballing, if they crossed the Union's picket line at Bunting Bearings' Kalamazoo facility. He also alleges that the Union, by an unknown picketer, threatened employees with physical harm if they crossed the picket line.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Employer, and Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Bunting Bearings Corporation operates several facilities, including a plant in Kalamazoo, Michigan, where it manufactures and sells powdered metal bearings. From this facility, it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Michigan. Bunting Bearings is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union, Local 6-0293 of the Paper, Allied Industrial, Chemical and Energy Worker International (PACE), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since 1996, Bunting Bearings and the Union had been parties to a collective-bargaining agreement covering production and maintenance workers, including introductory (hereinafter referred to as probationary) employees, at the Kalamazoo plant. This agreement expired at midnight, April 26–27, 2001. Negotiations for a successor contract began in March 2001. On April 19, the last bargaining session held prior to the expiration of the contract, the parties were not close to agreeing to a new contract. A particularly contentious issue was the employer's desire to change the terms of employee health benefits from those set forth in the prior agreement.[1]

On April 19, Daniel Ferson, a representative of the Union's international and its lead negotiator, asked company negotiators for their last best offer. Phillip Henzler, Bunting's corporate human resources director and its lead negotiator, informed Ferson that the company was not prepared to make its final offer on April 19, but that it would present its final offer to the Union prior to the expiration of the contract. Ferson informed Henzler that he would not be available for negotiations during the week the contract expired (April 23–27) due to a previously scheduled international union training session. The Union would not agree to negotiate in Ferson's absence. Ferson also was unwilling to negotiate by telephone during breaks in his training session. The parties agreed to meet April 30, May 1 and 2. Ferson asked that the company extend the existing contract to May 5, 2001.

Henzler wrote Ferson a letter on April 20, confirming that Bunting would be providing the Union with its last, best, and final offer in the near future and stating that Bunting intended to implement this offer on April 27. On April 21, union members voted to authorize a strike against Bunting Bearings if contract negotiations were not concluded successfully. No date was set for the commencement of such a strike. Ferson had informed Phillip Henzler that he was going to seek such authorization at their April 19 meeting.

At about 1 p.m. on Thursday, April 26, 2001, Corporate Human Relations Director Phillip Henzler presented Local Union President John Witt the company's final offer. Witt met with all Union nonprobationary employees in the plant cafeteria about a ½ hour later. The members voted to reject the final offer, but agreed to work Friday, April 27, and Monday, April 30, without a collective-bargaining agreement. At about 3 p.m., Witt met with Henzler and Plant Manager Steven Kaylor in Kaylor's office. Witt informed Henzler and Kaylor that the Union had rejected management's final offer, but had agreed to work through Monday, April 30, without a contract. Henzler told Witt he would have to discuss this offer with his superiors at the company's headquarters in Holland, Ohio.[2]

About ½ hour later, Henzler informed Witt that Bunting would not extend the existing collective-bargaining agreement or allow employees to work without a contract. He also informed Witt that Bunting would be sending all second shift employees home with 4 hours pay for showing up at work on April 26. From his conversation with Henzler, Witt inferred

[1] Bunting initially offered the Union a 1-year extension of the collective-bargaining agreement and then a 1-year extension with a 25-cent-per-hour wage increase. However, Bunting also told the Union that if this offer was rejected that it would insist on changes in the employees' health insurance program.

[2] I credit Witt's testimony as to what was said on April 26, over that of Henzler and Kaylor, for reasons set forth more fully below.

that Bunting Bearings was locking out the nonprobationary employees. He returned to the cafeteria and told the employees that they were being locked out and that Bunting would immediately distribute their paychecks.

Employees assembled by the time clock at about 3:30 p.m. on April 26. All nonprobationary employees were handed envelopes with paychecks for work performed the prior week and a COBRA notice.[3] COBRA, the consolidated omnibus budget reconciliation act of 1985, requires that most employers sponsoring group health plans offer employees and their families who are losing coverage under the employer's plan, the opportunity for a temporary extension of health coverage. None of Bunting's probationary employees was given either a paycheck or a COBRA notice. At least three probationary employees (Floyd Williams, Sherri Hirleman, and Steven Wesaw) had worked for Bunting long enough to be covered by its health plan.[4]

On April 26, plant Human Resources Director Bill Clark and/or Supervisor Frank Hayworth told probationary employees to report for work at 7 a.m. on Friday, April 27, and that they would be paid on Friday. Thus, COBRA notices were not given to probationary employees who had health insurance coverage because Bunting expected them to be at work the next morning. None of the nonprobationary bargaining unit employees were told to report to work on April 27, and none were told that they could do so.[5]

The Union established a picket line outside the Kalamazoo plant the next morning. The strikers planted placards in the ground proclaiming that they were locked out. None of the signs indicated that the employees were on strike.[6] Beginning on April 27, and continuing until about May 29, 2001, Bunting's Kalamazoo plant operated one 12-hour shift, rather than two shifts, as had been the case prior to April 27. Until May 22, 2001, production and maintenance work was performed exclusively by probationary employees, supervisors, office clerical employees, and employees borrowed from other Bunting plants.

On April 27, all of the probationary employees reported for work except Todd McNett. Between 6:30 and 7 a.m., McNett called the Kalamazoo plant and told one of the office clericals that he would not cross the Union's picket line. This clerical employee told McNett that he should understand that refusal to cross the picket line was grounds for immediate termination. McNett answered affirmatively.[7] There is no direct credible evidence that any other probationary employee was told they would be terminated if they refused to cross a picket line.[8] There is also insufficient circumstantial evidence for me to infer that this was the case. In this regard, it is particularly significant that McNett did not testify that he had been threatened with discharge or discipline prior to his telephone call on the morning of April 27.

McNett reported to the plant later in the morning to turn in some tools and clean out his locker. McNett never worked for Bunting again and apparently never participated in the picketing. Members of Bunting management, including Plant Manager Steven Kaylor, Office Coordinator Karen Thomas, and Vice-President Dean Lamb were aware by the close of business April 27, that McNett had refused to cross the Union's picket line. No later than Tuesday, May 1, Corporate Human Resources Director Phillip Henzler was also aware that McNett had refused to cross the picket line.[9]

Either on April 27 or 30, Office Clerical Dana Kane or Liz Ottney prepared a "Personnel Action Notice" which stated that McNett had been "terminated due to strike." On Tuesday, May 1, Plant Manager Steve Kaylor told Kane to remove this notice from McNett's file and to prepare another one. He explained to her that Bunting could not fire McNett for refusing to cross the picket line. The second notice (GC Exh. 11) states that McNett was terminated effective April 27, 2001, for "2 day no show."[10]

On Monday, April 30, Bunting set up a video camera in one of its offices and began videotaping the pickets. This video taping continued until employees stopped picketing in late May or early June. The Union and Bunting had their next negotiating session on Wednesday, May 2, 2001.[11] At the end of the meeting, Henzler asked the union representatives, "What makes you think you're locked out?" International Representative Daniel Ferson replied that the Union concluded that it was locked out from Henzler's conversation with Witt on April 26. Henzler did not respond further. Additional negotiating sessions were held on May 8, 11, and 17, 2001.

[3] Bunting employees' usual payday was Friday.

[4] Article V, section 1, of the parties' collective-bargaining agreement (GC Exh. 2 at p. 7) provides:

> An employee shall be considered to be an introductory employee without seniority until he has been on the payroll and has worked ninety (90) working days within the initial full nine (9) month period, after which he will be placed upon the seniority list and his seniority shall date back to the date of his original hiring within such nine (9) month period. In all cases, the introductory employee's benefits will become effective after he has worked forty-five (45) working days.

Williams, Hirleman, and Wesaw completed their 90-day introductory period between April 26 and May 29, 2001; therefore, it is apparent that by April 26, they were covered by Bunting's group health insurance plan.

[5] I discredit all testimony that any nonprobationary employee was told to report to work on April 27, or that any were told that they would be allowed to work on April 27, for reasons set forth in the portion of this decision section regarding credibility resolutions.

[6] The wording of the Union's picket signs was changed after May 21, to indicate that a strike was in progress.

[7] I credit McNett's testimony that he never told anyone that he was quitting. My reasons for crediting McNett are set forth later in this decision.

[8] I credit the testimony of Frank Hayworth and Floyd Williams over that of John Witt with regard to whether Hayworth threatened Williams with discharge if he crossed a picket line a week or two before the lockout began.

[9] Karen Thomas concedes that McNett told her he wouldn't cross the picket line. I infer she told this to Hayworth and Kaylor and that Kaylor told Lamb and Henzler that McNett had refused to cross the picket line.

[10] I credit Dana Kane's testimony about the personal action notices for reasons set forth in the "credibility resolution" portion of this decision.

[11] Henzler was unable to meet with the Union on April 30, or May 1.

At the May 17 meeting, Henzler told union negotiators that employees had always been welcome to return to work. The same day, Henzler sent a letter to all nonprobationary employees stating that, "contrary to the union's position and belief, Bunting Bearings Corp. Kalamazoo plant doors have been and continue to remain open. Bunting Bearings Corp. intends to implement the terms and conditions of employment that was set forth in the Company's last, best and final offer effective Monday, May 21, 2001."

Union members met on May 19, and voted unanimously to return to work but to reject the company's final offer. Another union meeting was held on May 21; the membership reconsidered the decision and voted 12 to 9 not to return to work. The Local Union wrote to the Union's International to seek authorization for a strike, based upon the April 21 vote. The Union informed Bunting that it was on strike effective on May 21.[12]

At the May 21 union meeting, Employee Chris Edgerton asked what would happen if a member crossed the picket line. Daniel Ferson replied that pursuant to the International Union's Constitution, a member could file charges against another member for crossing a picket line. If this occurred, he continued, there would be a hearing and that the member who crossed the picket line could be fined by the Union for up to $2,500 and be expelled from the Union.[13]

Union Steward Lee Asakevitch gave employee Shurie Blett and other picketers similar information at some unspecified time prior to May 21, while they were on a picket line. In response to a question, Asakevitch told Blett and others that an employee who crossed the picket line could be fined, expelled from the Union and could lose their job. Asakevitch also told her that the Union could prevent such an individual from getting another job at a union shop.[14]

On May 22, some nonprobationary employees, including Patrick Griffin, crossed the Union's picket line and returned to work. Picketer Robert Lemmers videotaped the employees crossing the picket line. Griffin, who is African-American, made an obscene gesture to Lemmers with his middle finger. Lemmers called Griffin "boy."

More employees crossed the picket line on May 29. The pickets booed, called the picket line crossers "scabs," and blew air horns. At some point an unidentified picket remarked that it was too bad things weren't like they were in the 1970s when employees who crossed picket lines were beaten up and had stones thrown at them. Local President John Witt was on the picket line at the time about 50 yards away. It has not been established that Witt heard this remark.

Upon returning to work on May 29, Employee Sue Carol Prince circulated a petition stating that the signatories no longer wanted to be part of the Union. The petition was signed by 19 employees.[15] The bargaining unit consisted of 35 employees including McNett, or 36 including Janice DeLano, who was on medical leave. Nine of the 19 signatories were nonprobationary employees on April 26, and did not work at the plant between April 27 and May 22. At least two more, Sherri Hurleman and Steven Wesaw, completed their probationary periods between April 27 and May 29; Hurleman and Wesaw worked at the plant during this period. Four more signatories, Debbie Ash, Peter Ford, Floyd Williams, and Thomas Dingham, were probationary employees who worked at the plant during this entire period as well.[16] The four remaining signatories were hired on April 30 and May 1 (Nicole Comstock, Rachel Thomas, Jenny Boehm, and Kim Bailey).

Prince gave the petition to Steve Kaylor, who faxed it to Phillip Henzler on May 29. The next day Prince filed a petition with the NLRB to decertify the Union. On May 31, Henzler wrote the Union, withdrawing Bunting's offer for a new contract. On June 5, he sent the Union a letter with the withdrawal petition attached. This letter informed the Union that Bunting would no longer negotiate with it because a majority of bargaining unit members did not wish to be represented by the Union any longer. The Union has never taken issue with Bunting's assertion that it had lost the support of a majority of the bargaining unit members. However, the Union filed a charge alleging that the withdrawal of the company's contract offer violated the Act. In September 2001, the Regional Director dismissed the withdrawal petition pending the resolution of the unfair labor practice charges.

Bunting Bearings' decision to contest Dana Kane's unemployment insurance claim

Bunting terminated Dane Kane on November 21, 2001, for excessive absenteeism. Shortly thereafter, Kane called Robert Lemmers at work. She discussed her termination and asked Lemmers for the telephone number of Union Representative Dan Ferson. She told Lemmers she had some information to give Ferson regarding the termination of Todd McNett. The next day Lemmers was summoned to Steve Kaylor's office. Kaylor, Frank Hayworth, and Karen Thomas told him not to have Dane Kane call him at work anymore and that he should

[12] The Union voted to end the strike on June 3.

[13] I credit Ferson's testimony that he did not tell employees that they could lose their jobs or be blackballed if they crossed the picket line. Two other witnesses who signed the May 29, 2001 withdrawal petition and attended the May 21 meeting did not testify that they heard either Ferson or John Witt make such a statement. Shurie Blett was not asked about the meeting, but Sue Carol Prince, who initiated the withdrawal petition, did testify about what was said. She recalled either Ferson or Witt saying that a member could be fined up to $25,000 (Edgerton recalled the figure being $2,500) but said nothing about threats to members' jobs or blackballing. Given the fact that Edgerton cannot recall who made the remark and Prince doesn't recall any threat to members' jobs, I find the General Counsel has not established that either Ferson or Witt told employees that they could lose their jobs or be blackballed if they crossed the picket line.

[14] I credit Blett's account of the conversation over that of Asakevitch.

[15] Respondent has not established that James L. Johnson signed the petition or that Johnson's name was affixed to the petition with his consent. On June 6, 2001, Johnson executed a document expressing his desire to quit the Union.

[16] Williams was hired by Bunting on January 2, 2001. Although GC Exh. 15 and R. Exh. 1 suggest that he was not a probationary employee on May 29, 2001, Steve Kaylor testified that Williams' probationary period was extended on March 13, 2001, for giving other employees alcoholic beverages during working hours on company property. Williams testified that the extension was for a 6-month period. Thus, Williams was still a probationary employee on May 29, 2001.

not have any more contact with Kane because she could not be trusted.

On December 3 or 4, 2001 Kane gave an affidavit to an agent of the General Counsel. On or about the same day, she filed an application for unemployment insurance compensation. The Union filed a new charge against Bunting on December 5, relating to Todd McNett's discharge. The Regional Director served a copy of this charge on the employer that day.[17] Bunting contested Dana Kane's unemployment insurance application on December 11.[18] Bunting does not contest all former employees' unemployment insurance claims. There is no credible evidence as to what criteria it applies in deciding whether or not to file such a contest.

Credibility Findings On Which The Factual Findings Are Predicated

The reasons for which I credit John Witt's testimony that he informed Steve Kaylor and Phillip Henzler that the Union would be willing to work on April 27 and 30 without a contract.

Bunting's corporate human resources director, Phillip Henzler and Plant Manager Steven Kaylor testified that Local Union President John Witt did not offer to work beyond the expiration of the collective-bargaining agreement without a contract. I credit Witt's testimony that he did so. Every witness who attended the Union's meeting in the plant cafeteria just prior to Witt's conversation with Henzler and Kaylor, and who addressed this issue, testified that the employees agreed to work 2 days without a contract and that Witt said he would make this offer to Bunting management (i.e., Witt, James Walker, Robert Lemmers, and Shurie Blett). Shurie Blett also testified that Witt told them upon returning from his meeting with Henzler and Kaylor that Bunting was locking out the employees.

Shurie Blett's testimony is particularly important in this regard because she is now hostile to the Union, having had internal union charges filed against her for crossing the Union's picket line. She also signed the withdrawal petition on May 29. Given the above-mentioned testimony, which I credit, I see no reason why Witt would not convey this offer to management and indeed, I find that he did so. Finally, for reasons fully discussed with regard to issues surrounding the termination of Todd McNett, I find Respondent's witnesses Henzler and Kaylor to be generally incredible.

No nonprobationary bargaining unit employees were told to report to work on April 27, and none were told that they could do so.

Steven Kaylor's testimony is riddled with internal inconsistencies and thus I decline to credit him on any matter for which his testimony is not corroborated by the persuasive testimony of other witnesses. I therefore decline to credit his testimony that he heard Frank Hayworth tell any nonprobationary employees on April 26, that the plant would be open for business at 7 a.m. April 27.[19]

I also discredit Karen Thomas's testimony that she told nonprobationary employees, including Robert Arndt, that they were not locked out. First of all, it is not clear how Thomas would have known on April 26, whether or not employees were locked out. She was not present in the closed door meeting between Witt, Henzler, and Kaylor. I also decline to credit her testimony that she heard Witt say "they voted to strike" (Tr. 389). Employees voted to authorize a strike on April 21; the only thing employees voted on at their April 26 meeting was whether or not to accept the company's final contract proposal; thus, it is unlikely that Witt said "they voted to strike" on April 26.

I also discredit Frank Hayworth's testimony to the extent it stands for the proposition that he informed any nonprobationary employee that they could return to work on April 27. Employees posted signs outside the Kalamazoo plant for over 3 weeks proclaiming a lockout without Bunting management notifying them unambiguously that they were misinformed.

The credible testimony of all nonprobationary employees at hearing also leads me to conclude that only probationary employees were told or led to believe they were welcome at work on April 27. Bob Lemmers, who was employed by Bunting at the time of this hearing, testified credibly that on April 26, all he was told by Frank Hayworth was to leave the plant. James Walker corroborates John Witt's testimony that only probationary employees were told to report the next day.

Although Shurie Blett testified at hearing that Hayworth told her that employees were not locked out, her testimony is less credible than the affidavit she executed on May 17, 2001. In that affidavit, Blett stated, "I was under the impression that we were locked out, and I filed for unemployment." Moreover, on cross-examination, Blett conceded that when she filed for unemployment insurance compensation in May 2001, she was under the impression that she had been locked out.

[17] The Union apparently filed an earlier charge on behalf of McNett to which Bunting responded with a position statement on July 26, 2001 (GC Exh. 18). A complaint was not issued on the basis of this charge. The Union filed charge 7–CA–44614-1 after Dana Kane spoke to Daniel Ferson. The General Counsel amended the complaint to encompass this charge on January 25, 2002.

[18] I find some of Kane's testimony credible but cannot credit other portions of it due to her extreme hostility towards Bunting and Karen Thomas. Her testimony suggests a personal animus towards Thomas that transcends their relationship at work. Thus, I do not credit her testimony that Steve Kaylor and Karen Thomas told her prior to December 5, that Bunting would not contest her claim for unemployment insurance benefits. I also do not credit her testimony that Karen Thomas told her that Bunting knew what Kane was telling the NLRB and that Bunting "would make her pay."

I also do not credit Kane's testimony that she heard Steve Kaylor say on April 26, that the Union had offered to work 2 days without a contract. I also decline to credit her testimony that Kaylor told her in June 2001 to tell an NLRB agent that she knew nothing about McNett's termination. I do credit, however, her testimony that Kaylor told office clerical employees that refusal to cross the Union's picket line would be grounds for termination. This testimony is logically consistent with the testimony of other witnesses, such as Todd McNett's credible account of his telephone conversation with an office clerical on the morning of April 27.

[19] Kaylor's testimony leaves open the possibility that he heard Hayworth address only probationary employees.

The reasons for which I credit Todd McNett's testimony that he did not tell Bunting that he quit

Todd McNett testified that he called the Kalamazoo plant on the morning of April 27, told whoever answered the phone that he would not cross the Union's picket line and was told that this was grounds for immediate termination. Frank Hayworth and Karen Thomas both testified that McNett told them he was quitting, although even Thomas concedes that McNett also told her that he would not cross the picket line.

I credit McNett over Thomas and Hayworth in part because I find no reason to doubt the truthfulness and accuracy of McNett's testimony and many reasons to doubt the accuracy and candor of the testimony of all of Respondent's witnesses insofar as it pertains to the reasons that Todd McNett ceased to be an employee of Bunting on April 27. It would be extremely coincidental and highly improbable that McNett decided to quit on the morning of April 27, for reasons unrelated to the picket line. Again, Karen Thomas testified that McNett told her he wouldn't cross the picket line.

Moreover, I find the testimony of Respondent witnesses regarding McNett to be so incredible, that it suggests that their testimony is inaccurate or untruthful in other respects. I start from the proposition that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reasons for its conduct are not among those asserted, *Black Entertainment Television*, 324 NLRB 1161 (1997). I draw such an inference herein.

Thomas testified that McNett told her he quit, but that she did not tell Steve Kaylor that, when, later on April 27, she overheard Steve Kaylor telling Vice President Dean Lamb that McNett did not show up for work and did not call in. It is very unlikely that Thomas would tell Kaylor that McNett called in, as she testified, without also telling him that he quit, if he did so. Thomas testified that she did tell Plant Supervisor Frank Hayworth that McNett quit.

Hayworth's testimony is internally inconsistent. He testified that about 10 a.m. McNett came to the plant to clean out his locker. Hayworth testified further that he asked McNett what was going on and that McNett told him he was quitting because he didn't like the job (Tr. 440–441). Impliedly, according to Hayworth, McNett said nothing about the picket line, which even if Thomas' testimony is accurate, is highly unlikely.

On cross-examination, Hayworth's testimony was somewhat different. He testified that went to the plant office at 7 a.m. when he noticed McNett's absence. He testified further that one of the secretaries told him that McNett had called in and said he was quitting. Hayworth testified he was not told anything about McNett's refusal to cross the picket line, which I again find highly incredible.

Plant Manager Steve Kaylor testified that nobody told him that McNett quit until Frank Hayworth did so in January 2002. According to Kaylor, he asked Hayworth why he hadn't mentioned this to him previously. Kaylor testified, "He [Hayworth] says, well, I did not think it was necessary. I thought he was already terminated." If this testimony is truthful, it indicates that Hayworth thought that McNett was fired.

Finally, Human Resources Director Henzler, who was not at the Kalamazoo plant on April 27, testified that he understood that McNett quit when he decided to fire him on May 1 and 2. If McNett quit there would be no reason to fire him. Moreover, Henzler's testimony regarding McNett is incredible for other reasons.

On cross-examination, the General Counsel pressed Henzler to explain why McNett was terminated for a 2 day no show on Tuesday, May 1, 2001, despite the fact that the termination was effective on Friday, April 27. Henzler testified that he knew that McNett did not work Friday, Monday, and Tuesday when he made the decision to terminate McNett, knew that McNett had not called the plant on Monday and Tuesday, but did not know and did not ask whether McNett called in Friday. Henzler testified that he asked Kaylor whether McNett called in on Monday and Tuesday, but did not ask Kaylor if McNett called in on Friday, the first day he missed work and the first day that the picket line was up. I do not credit this testimony.

More importantly, the conduct of Bunting management prior to the hearing is completely inconsistent with the testimony of its witnesses that McNett quit his employment. The personal action notice signed by Steve Kaylor on May 1, 2001, states that McNett was discharged for "2 day no show." There is nothing in McNett's personnel file indicating that he quit.

On July 26, 2001, Bunting, through counsel, filed a position statement with the NLRB regarding a charge filed alleging that Bunting terminated McNett for refusing to cross the picket line. In that position paper, Bunting did not contend that McNett quit, it alleged that McNett was terminated on May 1, 2001, for poor job performance and excessive absenteeism. It also alleged that McNett would have been fired even if he had reported for work on April 27. There is no documentary evidence to support the proposition that McNett would have been terminated for poor job performance.[20] More importantly, the record belies Respondent's assertion that he would have been terminated for excessive absenteeism. The testimony of Human Resources Director Henzler concedes this point (Tr. 273). Indeed, the record shows that the only absences McNett had in the 6–7 weeks he worked for Bunting prior to April 27, were excused absences relating to a kidney stone. In view of this record, it is highly likely that the assertion that McNett quit was devised after December 5, 2001, to deal with fact that Respondent was aware that Dana Kane was talking to the NLRB about McNett's termination.

Reasons for crediting Dana Kane's testimony that she prepared a personnel action notice stating that McNett was "terminated due to strike," and later removed it from McNett's personnel file and prepared another notice stating that McNett was discharged for 2-day no show.

Respondent concedes that General Counsel Exh. 11 is not the original personnel action form prepared for McNett's termination. Phillip Henzler testified that he called and spoke with Dana Kane on the telephone, asked her to correct some dates on the original form, but that instead Kane sent him a new form signed by Kaylor. The fact that Kane appears to have started preparing the form on May 1, and that Kaylor signed the

[20] There is no credible testimonial evidence to support this proposition either.

new form on May 10, indicates that some deliberation took place regarding the corrected form.

Henzler testified that he ordinarily receives a personnel action form as a matter of standard practice. He testified further that, not having received one by about May 9 or 10, he called Kane and asked her what dates were on the form. He offered no explanation for why he asked her what was on the form instead of merely directing her to fax him a copy. I conclude that Kane's testimony is accurate, that the form was changed in order to reflect a reason for termination that was not so obviously illegal. Moreover, while Kane may have reason for wanting to get even with Bunting and its management, there is no indication in this record why she would do so by fabricating a story about the McNett personnel action notice. Finally, as the General Counsel points out in its brief, Steve Kaylor did not contradict Kane's testimony that he told her to remove the original notice from McNett's file and prepare a new one.

ANALYSIS

Respondent violated Section 8(a)(3) and (1) by terminating Todd McNett on April 27, 2001, for refusing to cross the Union's picket line.

Todd McNett refused to cross the Union's picket line on April 27, 2001. I have concluded, for the reasons stated earlier in this decision, that he was terminated by Bunting for that reason. It is well established that an employee's right to refuse to cross a picket line is protected by Section 7 of the Act. An employer who discharges or disciplines an employee for engaging in such protected activity violates Section 8(a)(3) and/or (1), *Overnight Transportation Co.*, 336 NLRB 387 (2001); *ABS Co*., 267 NLRB 774 (1984).

The General Counsel has not established that Respondent violated Section 8(a)(4) and (1) by contesting Dana Kane's unemployment insurance claim

Dana Kane provided the NLRB information about Todd McNett's discharge on or about December 3 or 4, 2001, and filed an unemployment insurance claim within the next day or two. On December 11, 2001, after Respondent knew that Kane was providing information to the NLRB, it contested her claim. The issue herein is whether Bunting would have contested the claim had Kane not provided information to the NLRB.

I find infer that Bunting knew that Kane was talking to the NLRB by virtue of Bob Lemmers' testimony and the fact that it received a resurrected charge regarding the McNett discharge just prior to the filing of its contest. Respondent concedes that it does not contest all unemployment insurance claims, but has provided no evidence as to the criteria it applies in deciding whether or not to do so.

In order to prove a violation of Section 8(a)(3) or 8(a)(4) and (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity, and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[21] Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *Gary Enterprises*, 300 NLRB 1111 (1990).

Dana Kane engaged in protected activity by assisting the General Counsel in investigating the termination of Todd McNett. I infer that Bunting knew she was doing so and harbored animus towards her as a result. However, I conclude that there is insufficient evidence establishing that Bunting's decision to contest Kane's claim was motivated by a desire to retaliate against her for her protected activity. Although Bunting's contested Kane's claim shortly after it learned about her co-operation with the Board, it was required to respond to the claim quickly. General Counsel Exhibit 20 indicates that Bunting was required to respond to the claim within 10 days, if at all. Thus, I am unable to draw any inference from the timing of Respondent's contest. Further, I conclude that discriminatory motive is not established merely by Bunting's admission that it does not contest all unemployment insurance claims and the lack of evidence as to the criteria it uses in making this determination.

The lockout was not illegal upon the expiration of the collective-bargaining agreement at midnight April 26–27, 2001.

An employer may lockout its employees if its motive is solely to pressure their union to accept the employer's bargaining proposals, *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965). I conclude that this was Bunting's motive. Respondent knew that the Union had rejected its final offer and was preparing to strike. It was therefore perfectly legitimate to lock out its employees.

Respondent jumped the gun by locking out its employees before the expiration of the collective-bargaining agreement, which contained a no strike/no lockout clause (Article IV, Section 5(a)). I therefore find that it violated Section 8(a)(5) and (1) by ignoring its contractual obligations and sending its second shift employees home on the afternoon of April 26, without giving them 8 hours of pay, *Paragon Paint Corp*., 317 NLRB 747, 770 (1995). An appropriate remedy for this violation is to order Bunting to make its employees whole for the 4 hours of pay they were not given.

I also conclude that Bunting did not violate the Act by locking out only nonprobationary employees. Such a selective lockout would violate the Act if its selectivity was shown to be motivated by a desire to discourage union membership or tend to induce employees to resign from the Union, *Schenk Packing Co.*, 301 NLRB 487 (1991). Such is not the case herein. Respondent had a legitimate objective of pressuring the Union to accept its final offer by locking out the nonprobationary employees. It also had a legitimate objective in making the lockout selective so that it continue operations during the lockout.

[21] *Flowers Baking Co., Inc*., 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995).

This case is easily distinguishable from Schenk Packing in which the employer discouraged union membership by announcing that it would only consider employees as replacements for strikers if they resigned their union membership. In contrast, there is no evidence that those employees who completed their probationary period at Bunting during the lockout were in any way discouraged from joining or supporting the Union.

Bunting Bearings violated Section 8(a)(1) by videotaping employees on the picket line from April 30 through the end of May or early June 2001.

The Board has long held that absent proper justification, the photographing or videotaping of employees engaged in protected activities violates the Act because it has the tendency to intimidate, *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). Videotaping of picketers is not justified by an employer's belief that "something might" happen.

Respondent argues that it was justified in videotaping the picket line because several bargaining unit members complained to it that they had been threatened by other unit members and that these threats led it to install the video camera in an office facing the picket line (See R. br. at pages 24, 29–30). The record does not support either proposition. The only evidence regarding threats is hearsay testimony from company officials. Several of the individuals mentioned as making complaints to management about such threats testified at the hearing and none of them testified about these threats. Moreover, there is no evidence that the camera was installed in response to such threats.[22] Bunting violated Section 8(a)(1) in videotaping the picket line.

Bunting Bearings did not violate the Act in withdrawing recognition from the Union and refusing to bargain with the Union on the basis of the March 29, 2001 employee petition. It has not been established that the petition was causally related to Buntings' unremedied unfair labor practices.

In *Levitz*, 333 NLRB 717 (2001) the Board held that an Employer must show an actual loss of support by a majority of bargaining unit members to withdraw recognition from an incumbent union. It cannot withdraw recognition and refuse to bargain with an incumbent union merely on the basis of a good-faith doubt regarding the union's majority support. In the instant case, there is no dispute that Bunting has established that the Union lost the support of a majority of unit members by May 29. However, there remains the issue of whether the May 29 employee petition was tainted by Respondent's prior unremedied unfair labor practices, *Vincent Industrial Plastics*, 328 NLRB 300 (1999). If so, Bunting would have violated Section 8(a)(5) and (1) in relying of this petition in refusing to bargain with the Union.

In demonstrating that an employee withdrawal petition is "tainted," the General Counsel must establish that there is a causal relationship between unremedied unfair labor practices and the employees' expression of disaffection with the incumbent union. When the unremedied violations of the Act do not include a general refusal to bargain, the Board considers several factors to determine whether such a causal relationship has been established:

> (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.[23]

The unremedied unfair labor practices herein occurred approximately 1 month prior to the execution of the employees' withdrawal petition—except for the videotaping, which was ongoing. With the exception of Todd McNett's discharge, these violations; the premature lockout and the videotaping were not likely to cause the employees' disaffection from the Union. McNett's discharge is the type of violation that may be sufficiently serious to taint the May 29, 2001 petition. However, there is no evidence that any other bargaining unit employee was aware of the discharge. In the absence of such evidence, I am unable to find that the discharge could have caused employee disaffection from the Union.

On this record, the withdrawal petition appears to have resulted from the Union's decision to reject Bunting's bargaining offers and the ensuing lockout—which I have concluded was legal once the clock struck 12 on April 27, 2001. Bunting was thus entitled to withdraw recognition from the Union and refuse to bargain with it in reliance on the May 29, 2001 employee petition.

The Union, through Daniel Ferson, did not violate Section 8(b)(1)(A) by threatening employees with loss of employment and blackballing from other employment if they crossed the Union's picket line.

I have found that Daniel Ferson, at the May 21, 2001 union meeting, informed unit members of the content of the Union's constitution, and that neither he nor John Witt threatened employees with loss of employment, blackballing, or a fine exceeding that which is provided for in the union constitution. I conclude therefore that his comments were not coercive nor violative of Section 8(b)(1)(A).

The Union did not violate the Act, through statements of an unknown picketer, suggesting that employees crossing the picket line should be beaten up and stoned.

I dismiss complaint paragraph 8 in the case against the Union because it has not been established that the person making threatening comments on the picket line regarding how things used to be in the 1970s was an agent of the Union. Moreover, as there is no evidence establishing that John Witt, the local union president, heard these remarks, I find that he did not ratify them.

The Union violated Section 8(b)(1)(A) by its agent, Steward Lee Asakevitch by informing unit members that they could lose

[22] Shurie Blett's testimony about the remarks made by an unknown picket occurred long after Bunting had started its videotaping.

[23] *Vincent Industrial Plastics*, supra; *Williams Enterprises*, 312 NLRB 937, 939 (1993), enfd. 50 F. 3d 1280 (4th Cir. 1995); *Master Slack Corp*., 271 NLRB 78, 84 (1984).

their jobs and be blackballed from other union employment if they crossed the Union's picket line.

Union Steward Asakevitch was apparently responding to a question from a unit member on the picket line concerning the consequences of crossing the picket line. However, Asakevitch had the apparent authority to speak for the Union and was thus its agent. As such, he had a responsibility to answer the question in a manner that was noncoercive. I find that in opining that a member could lose his or her job and/or be blackballed, his answer was coercive and violated Section 8(b)(1)(A).

CONCLUSIONS OF LAW

1. Respondent, Bunting Bearings Corporation violated Section 8(a)(5) and (1) by locking out its unionized employees before the expiration of its collective-bargaining agreement with the Union.

2. Respondent, Bunting Bearings Corporation violated Section 8(a)(3) and (1) by discharging employee Todd McNett for refusing to cross the Union's picket line.

3. Respondent, Bunting Bearings Corporation, violated Section 8(a)(1) by videotaping employees on the Union's picket line.

4. Respondent, Bunting Bearings Corporation, did not violate the Act in locking out its nonprobationary employees after midnight April 27, 2001.

5. Respondent, Bunting Bearings Corporation, did not violate the Act by withdrawing recognition of the Union and refusing to bargain with the Union on the basis of its receipt of the May 29, 2001 employee petition.

6. Respondent, Bunting Bearings Corporation, did not violate the Act by contesting Dana Kane's claim for unemployment insurance benefits.

7. The Union, Local 6-0293, Paper Allied-Industrial, Chemical and Energy Workers International Union, by Steward Lee Asakevitch, violated Section 8(b)(1)(A) in informing bargaining unit members that they could lose their jobs and be blackballed from further union employment, if they crossed the Union's picket line.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, Bunting Bearings Corporation, having discriminatorily discharged Todd McNett, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It must similarly make employees whole for wages and benefits lost by virtue of the premature lockout on April 26, 2001.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Bunting Bearings Corporation, its officers, agents, successors, and assigns, shall

Cease and desist from

(a) Discharging or otherwise discriminating against employees for the exercise of their rights under Section 7 of the Act, including refusing to cross a picket line;

(b) Videotaping or photographing employees who are engaged in protected activities;

(c) Locking out employees during the life of a collective-bargaining agreement which contains a no-strike/no lockout clause;

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Todd McNett full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Todd McNett whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Todd McNett in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Kalamazoo, Michigan facility copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 26, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(e) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

ORDER

The Respondent, Local 6-0293, Paper Allied-Industrial, Chemical and Energy Workers International Union, its officers, agents, and representatives, shall

1. Cease and desist from making coercive statements to unit members regarding the consequences of crossing a picket line.

2. In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its union office in Kalamazoo, Michigan copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all members and former members employed by Bunting Bearings Corporation at Kalamazoo, Michigan at any time since April 27, 2001.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Bunting Bearings Corporation, if willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(d) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 5, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 6-0293, Paper Allied-Industrial, Chemical and Energy Workers International Union or any other union, or refusing to cross a union picket line.

WE WILL NOT, without just cause, videotape or photograph any activities protected by Section 7 of the National Labor Relations Act, such as picketing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Todd McNett full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Todd McNett whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Todd McNett, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL make employees whole, with interest to for their loss of earnings due to our premature lockout of employees on April 26, 2001, prior to the expiration of our collection bargaining agreement with Local 6-0293, Paper Allied-Industrial, Chemical and Energy Workers International Union.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[26] Ibid at fn. 25.

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your rights guaranteed you by Section 7 of the Act by suggesting that you could lose your job or be blackballed from other employment for crossing a union picket line.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BUNTING BEARING CORP.